

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

HERSHEY FOODS CORPORATION

Employer-Petitioner

POWER GROUP, INC. D/B/A POWER LOGISTICS¹

Employer-Intervenor

6-UC-414

and

CHOCOLATE WORKERS LOCAL
UNION NO. 464 a/w BAKERY,
CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO²

Union

DECISION, ORDER, AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before David L. Shepley, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.³

¹ Power Group, Inc. d/b/a Power Logistics (herein Power Logistics) was permitted to intervene in this proceeding as a party in interest by Order of the undersigned Regional Director dated April 5, 2000. The name of the intervenor appears as corrected at the hearing.

² The name of the Union appears as amended at the hearing.

³ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th St., NW., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by June 9, 2000.

Upon the entire record⁴ in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer-Petitioner or Hershey Foods Corporation (herein Hershey) is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

The Union is the collective bargaining representative of a single unit of "all production and maintenance employees and teamsters" ⁵ employed by Hershey at its 19 East and West Hershey facilities (the Unit).⁶ The Union and Hershey have been parties to successive collective bargaining agreements for the Unit, the most recent of which is effective by its terms from November 17, 1997 through November 4, 2001. Since at least 1976 these agreements have, in the recognition clause, described the Unit as set forth above.

By the instant petition, Hershey seeks to clarify the existing Unit to exclude from it all employees employed at Hershey's new Eastern Distribution Center III (herein EDC III), which is located in the immediate geographic vicinity of the 19 East Plant.⁷ All of the work performed at the EDC III facility, which consists of warehousing and distribution work, was contracted by

⁴ All parties timely filed briefs in this matter which have been duly considered by the undersigned. The Petitioner has filed a Motion to Correct the Transcript, and that Motion is hereby granted.

⁵ The Union asserts that the term "teamsters" as used in the successive collective bargaining agreements refers to distribution or shipping work. Hershey does not take issue with the aforementioned definition of the term "teamsters".

⁶ The 19 East Plant is also referred to as the Main Plant. It is located at 19 East Chocolate Avenue in Hershey, Pennsylvania. The West Hershey Plant is located in West Hershey approximately 2.2 miles from the 19 East Plant.

⁷ EDC III is located partially in Derry Township, Dauphin County and partially in North Londonberry Township, Lebanon County, Pennsylvania, and has a mailing address in Palmyra, Pennsylvania. It is located about 4 miles (by highway) from the 19 East Plant and about 6.6 miles from the West Hershey Plant.

Hershey to Power Logistics. The EDC III facility was expected to become operational in May 2000.

The Union moves to dismiss the petition on the ground that it has made no claim to represent the Power Logistics employees at the EDC III facility. About September 30, 1999, shortly after Hershey made the announcement regarding the opening of the EDC III facility,⁸ the Union filed a grievance against Hershey contending the Employer violated the recognition clause of the parties' collective bargaining agreement by "arranging to perform shipping work in the manner and under the structure of the Power Logistics operation"⁹ and that it is a violation of the contract for shipping work "not to be returning under the contract."¹⁰ The Union further alleges with respect to Hershey's alleged breach of contract, that

to the extent that [Hershey] does not comply with the terms of the Labor Agreement, it is causing damages to members of the bargaining unit -- cognizable by specific money awards . . .

It is a misnomer to consider this work an "accretion" to the unit. It is part of the existing unit. It is covered by the contract. Once the work returns to the Hershey geographic area, it simply may not be contracted out to be performed by

⁸ As described in more detail in the text *infra*, for many years, the Union represented shipping room employees employed by Hershey at the 19 East Plant. In 1983, following negotiations between the Union and Hershey, this work was transferred to a site in the Mechanicsburg, Pennsylvania area, the Eastern Distribution Center I (herein EDC I). Since Mechanicsburg fell outside the geographical jurisdiction of the Union, the Union did not assert that employees performing shipping work at EDC I were included in the Unit.

⁹ See letter dated March 27, 2000, from Union counsel Bernard N. Katz addressed to Employer counsel Bruce D. Bagley.

¹⁰ See Union's letter dated September 30, 1999, to the American Arbitration Association invoking the contractual grievance-arbitration procedures. See also Union's counsel Katz's letter dated April 4, 2000, to Region Six of the Board.

Over the objection of Hershey, the grievance was processed to arbitration, and an arbitration hearing on the arbitrability of the grievance was held on May 12, 2000. Hershey contended that the grievance was not properly arbitrable, being nothing more than a thinly veiled attempt to accrete individuals who are not employed by Hershey into the Unit.

Hershey's action in filing of the instant petition was prompted by the Union's processing of the grievance to arbitration. In conjunction with the filing of the instant petition, Hershey also filed a Section 8(b)(1)(A) and 8(b)(2) charge against the Union (Case 6-CB-10443) alleging that the Union's filing and processing of the September 30 grievance violated the Act under the principles set forth in Chauffeurs, Teamsters and Helpers Local 776 a/w International Brotherhood of Teamsters, AFL-CIO (Rite Aid Corporation), 305 NLRB 832 (1991). In that case, the Board held that it was unlawful to prosecute a lawsuit to enforce an arbitration award that conflicted with a Board representation decision. Hershey's unfair labor practice charge is currently being held in abeyance pending decision on the instant petition.

another Employer – unless specific Agreements are made with the Union On the face of the Labor Agreement, coupled with the history of representation, the [Union] contract covers “all production and maintenance employees and teamsters . . .” in West Hershey and at the Hershey plant.¹¹

Based upon the above, the Union contends that the issue raised herein is solely one of contract interpretation appropriate for resolution under the grievance-arbitration procedure of the Hershey contract.¹² Thus, as noted, the Union contends that the instant petition must be dismissed. The Union, however, has never categorically averred that it is not seeking to represent the employees of EDC III under the terms of the agreement.

Hershey is a Delaware corporation with its headquarters located in Hershey, Pennsylvania, and is engaged in the manufacture of candy and other food products. As noted, among the plants that Hershey operates are two facilities in the immediate vicinity of Hershey, Pennsylvania: the 19 East Plant and the West Hershey Plant.

As noted, prior to 1983, Hershey shipped its own finished product to customers directly from its 19 East Plant and the shipping department employees were represented by the Union. In 1983, Hershey opened its first Eastern Distribution Center, EDC I, in Mechanicsburg, Pennsylvania, located about 30 miles from the 19 East Plant. The opening of the EDC I had a substantial impact on the shipping department at the 19 East Plant. The EDC I facility was operated as a non-union facility by a third party provider, and inasmuch as Mechanicsburg fell outside the geographic jurisdiction of the Union, the Union made no claim to that it was entitled to represent the EDC I employees.¹³

¹¹ See Union’s April 4 letter, *supra*, and opening remarks by Union counsel at the hearing in this matter.

¹² At the close of the hearing and in its post-hearing brief, the Union stated that the employees in the existing Unit should be permitted to bid on this work pursuant to the terms of the labor agreement since that agreement still encompasses “teamsters” as a category of employees covered by the agreement.

¹³ Thereafter, by early 1984, Hershey opened a second distribution center, the EDC II, in Mechanicsburg, which also was operated by a third party provider as a non-union facility.

The relocation of the shipping operation from the 19 East Plant to the newly established EDC I was the subject of a series of agreements negotiated between Hershey and the Union. At the time that the agreements were negotiated, there was no discussion between the parties regarding what would happen if Hershey returned the shipping operation to the 19 East Plant, or to the nearby area. The agreements themselves are silent on this issue.¹⁴

Thereafter, from 1983 to the present, there has been no distribution work performed at the 19 East Plant or in the immediate vicinity of the 19 East Plant.

About March 2, 2000, Hershey entered into an operating agreement with Power Logistics pursuant to which Power Logistics will operate a new distribution center for Hershey products. As noted, the new facility, called EDC III, is located partially in Derry Township, Dauphin County and partially in North Londonberry Township, Lebanon County, Pennsylvania, and has a mailing address in Palmyra, Pennsylvania. It is located about 4 miles (by highway) from the 19 East Plant and about 6.6 miles from the West Hershey Plant. The EDC III physical plant is owned by Hershey, but the computer system and material handling equipment used in the operation of the distribution center is owned by Power Logistics.

Power Logistics is in the business of operating distribution centers for various customers around the country. At its various distribution centers, Power Logistics receives product from its clients' manufacturing plants, stores the product, assembles the orders, and ships the orders directly to customers. At the EDC III facility, Power Logistics will perform these distribution functions for Hershey products which will be received from Hershey manufacturing plants around the country and in Canada. Thus, not only will the EDC III facility handle product manufactured at the 19 East Plant and the West Hershey Plant, but also the EDC III facility will handle product from about 19 other Hershey plants and 20 to 30 other companies referred to as co-manufacturers.

¹⁴ The Union contends that it has reserved its right to represent employees engaged in shipping functions pursuant to the contract's recognition clause.

The President of Power Logistics is Christopher Sims and the corporate Director of Human Resources is Mark Balzer. The General Manager of the EDC III facility is Ron Mueller and the Human Resources Manager at the EDC III site is Fred Sampson.

Power Logistics is a privately held company, whose owners are not owners of Hershey. In accordance with its usual practice, Power Logistics will operate the EDC III facility with its own management staff, hire its own workforce, determine its own wage and benefit structure, and retain full control of its own labor relations functions. Specifically, Power Logistics conducts its own hiring, by doing its own recruiting, using its own employment application and conducting its own interviews. Similarly, Power Logistics determines the functions required at each site and sets its own manpower needs. It determines its own wage rates, based upon its own local labor market wage analysis, and determines its own benefit structure.¹⁵ Further, Power Logistics sets its own personnel policies, including its own discipline policy. As of the date of the hearing, Power Logistics had hired approximately 50 employees, excluding management, for the EDC III facility. It is anticipated that by the end of calendar year 2000, the EDC III facility will employ approximately 400 line employees, and that this number could increase even further.

There will be no interchange of employees between Hershey 19 East and West Hershey Plants on the one hand, and the EDC III facility, on the other hand. While there will be three to four Hershey management personnel at the EDC III facility, these managers will be present on site solely to coordinate the distribution process with Hershey, and will not direct the EDC III workforce.

As noted, the Union contends that the instant unit clarification petition should be dismissed in that it has not made a claim to represent the Power Logistic employees working at the EDC III facility. Although the Union asserts that it has disclaimed interest in representing the

¹⁵ At the EDC III facility, the starting wage for hand packers (apparently the lowest paid line employees) will be about \$8.25 per hour, the starting wage for lift truck operators will be \$11 per hour and the starting wage for maintenance techs (the highest paid line employees) will be \$14 per hour. Power Logistics will provide health and welfare and retirement benefits.

Power Logistics employees performing distribution work for Hershey, the Union has nonetheless invoked the contractual grievance-arbitration procedure to assert that Hershey has violated the contract's recognition clause and seeks damages and other relief therefore. In its grievance, the Union, as noted, asserts that the distribution work performed at the EDC III facility is within the labor agreement's recognition clause. Further, the Union asserts that the Union is the appropriate bargaining agent for the employees performing such distribution work and that its contract with Hershey applies to this work, and that Hershey has violated the contract.

Under long-standing Board precedent, "the determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator." Marion Power Shovel Company, Inc., 230 NLRB 576, 577-578 (1977); Williams Transportation Company, 233 NLRB 837, 838 (1977).

The Board has declined to defer and leave to an arbitrator the responsibility for determining unit questions such as whether a newly acquired plant is an accretion to an existing bargaining unit covered by a collective-bargaining agreement. See, e.g., Massachusetts Electric Co., 248 NLRB 155, 156 (1980). Similarly, the Board does not defer to arbitration awards which purport to decide issues affecting employee representation or the appropriate scope or composition of the unit, even though they arguably touch on contractual relations. See Marion Power Shovel Company, Inc., *supra*; see also Hershey Foods Corporation, 208 NLRB 452, 457 (1974).

Thus, in the instant case, it would be inappropriate to dismiss the petition merely because the Union has invoked the grievance arbitration procedure of the collective bargaining agreement. The issue presented by the petition is whether it is proper to exclude employees performing distribution work at the EDC III facility from the bargaining unit set forth in the collective bargaining agreement between the Union and Hershey. Inasmuch as the Union claims that the distribution work performed at the EDC III facility is within the scope of work set

forth in the contract, for which it is the bargaining agent and to which the contract applies, the petition raises issues involving the application of statutory policy rather than contract interpretation and, therefore, the issues are not a matter which the Board will defer to the arbitral process. In that the instant petition raises issues of the employee representation rights under Section 9 of the Act, I, therefore, conclude that dismissal of the petition is not appropriate.

Considering the issues raised by the instant unit clarification petition, the threshold issue is whether the existing Unit actually includes employees performing distribution work such as that performed at the EDC III facility. As noted, the Unit is described as “all production and maintenance employees and teamsters” at Hershey’s 19 East and West Hershey facilities. This unit description has been incorporated in successive collective bargaining agreements, and the most recent agreement, effective by its terms from November 17, 1997 through November 4, 2001, includes this language. However, distribution work has not been performed at the 19 East Plant or the West Hershey Plant, or in the immediate geographic vicinity of those plants, for a period of 17 years.

The Board has held that in representation cases in general, and in unit clarification proceedings in particular, it looks to the actual, existing composition of units and to employees actually working to determine the composition of units, and not to abstract grants of recognition. Thus, the Board has refused to clarify a unit based solely on the operation of the labor agreement’s recognition clause, to include employees, by way of accretion, performing work which had not been performed at the employer’s facility for many years, even though the job classification had been included in the unit in the original certification and even though such job classification had been included in the recognition clauses of successive collective bargaining agreements. In that case, the Board found the inclusion of the job classification in the successive recognition clauses to be immaterial, and found the 12 year hiatus during which no such work was performed at the facility controlling. Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993); Cf. F & A Food Sales, Inc., 325 NLRB 513 (1998), enf’d. 202 F. 3d 1258 (10th

Cir. 2000) (1 ½ year hiatus distinguishable).¹⁶ Here, as noted, there has been a 17 year period during which Hershey has had no distribution operations and no distribution employees at the 19 East Plant or the West Hershey Plant.

In the instant case, it is clear that the Union views Hershey's action in failing to operate EDC III facility with its own employees as part of the Unit to be a breach of labor agreement's recognition clause. In support of this contention, the Union appears to be arguing both in the instant case and in the arbitration case, that had Hershey opened the EDC III facility with its own employees, those employees would have automatically been accreted into the Unit by operation of the recognition clause. As set forth above, this contention must fail in light of the Board's decision in Coca-Cola; and it must necessarily be concluded herein that the shipping work being done at the EDC III facility, even if Hershey was performing such work with its own employees could not be found, at least by virtue of recognition clause, to be bargaining unit work.¹⁷

Contrary to the Union's sole reliance on the effect of the recognition clause, employees performing distribution work at the EDC III facility could be accreted to the Unit, on a decision by the Board, only if such a finding could be sustained through application of traditional accretion principles. Or, in the alternative, employees performing such work, even if employed by

¹⁶ In its decision in Coca-Cola, the Board also considered whether the employees at issue should be accreted into the existing bargaining unit pursuant to the application of traditional accretion principles, and not solely on the operation of the labor agreement's recognition clause. The Board concluded that the employees at issue, who worked at the same facility as the unit employees, did not constitute an accretion.

¹⁷ Hershey also argues that apart from the fact that distribution work had not been performed by the existing Unit for 17 years, that the recognition clause is limited by its terms to two specific facilities, the 19 East Plant and the West Hershey Plant. Thus, Hershey argues that the recognition clause provides no basis for a claim made to work being performed at a third facility, which is geographically discrete from the two plants named in the recognition clause.

Hershey, could be found to constitute a separate appropriate unit apart from the existing Unit upon demonstration that the Union enjoys majority support among those employees.¹⁸

Applying traditional accretion factors to the instant case, the record clearly reveals that Power Logistics and Hershey do not have common ownership, do not have common management, and do not have centralized control of labor relations. Considering the existing Unit and the EDC III employees, there is no interchange of employees, no common supervision and the terms and conditions of employment are different. The EDC III facility is geographically separate from the 19 East and West Hershey Plants. Thus, there is no basis for the accretion of the Power Logistics employees working at the EDC III facility into the bargaining unit represented by the Union.

Based upon the above and the record as a whole, I cannot conclude that in view of the particular circumstances presented herein and in view of the stated positions taken by the Union both in the instant case and in the arbitration case that it would be appropriate to dismiss the instant petition on the ground that the issue involved herein is clearly one of contract interpretation for an arbitrator to decide and on the ground that the Union does not seek to represent the employees of Power Logistics at the EDC III facility. Further, inasmuch as the application of traditional accretion factors to the instant situation compels the conclusion that the employees employed by Power Logistics at the EDC III facility should not be accreted into the existing bargaining unit, the unit shall be clarified to exclude from the existing bargaining unit those employees employed by Power Logistics at the EDC III facility.¹⁹

¹⁸ Even when there is a relocation of what has been traditional bargaining unit work to a new facility, the Board will apply a rebuttable presumption that the new operation is a separate appropriate unit, even if a majority of the new operations' workforce is comprised of employees transferred from the original bargaining unit. See Armco Steel Company, L.P., 312 NLRB 257 (1993) citing Gitano Distribution Center, 308 NLRB 1172 (1992). Thus, even if Hershey had continued to perform distribution work at the 19 East facility after 1983, and then relocated such distribution work to EDC III and performed such work directly, instead of through a separate third party provider, the EDC III workforce would presumptively have been a separate appropriate unit.

¹⁹ To the extent that the Union contends in its grievance that the recognition clause of the labor agreement precluded Hershey from unilaterally contracting with a third party provider to operate the EDC

ORDER

IT IS HEREBY ORDERED that the unit of all production and maintenance employees and teamsters at the Employer's Hershey, Pennsylvania Plant and the West Hershey Plant represented by Chocolate Workers Local Union No. 464 a/w Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO be, and it hereby is, clarified to exclude all employees employed by Power Group, Inc. d/b/a Power Logistics (Power Logistics) at the Eastern Distribution Center III (EDC III) facility located in Derry Township, Dauphin County and North Londonberry Township, Lebanon County, Pennsylvania.

Dated at Pittsburgh, Pennsylvania, this 26th day of May 2000.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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III facility and that the labor agreement was further breached because bargaining unit employees were denied the opportunity to "bid" into positions at EDC III and/or to transfer to EDC III, these are issues which are not presently before me for resolution. I make no decision at this time whether the Union's possible future continued processing of the grievance based upon the aforementioned considerations is contrary to my decision in the instant case.